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In The

Supreme Court of the United States

ARTHUR S. LUJAN, an individual, in his official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER, an individual in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California,

Petitioners,

v.

G&G FIRE SPRINKLERS, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

THOMAS S. KERRIGAN
Counsel of Record
DIVISION OF LABOR STANDARDS ENFORCEMENT
DEPARTMENT OF INDUSTRIAL RELATIONS
State of California
6150 Van Nuys Boulevard, Suite 100
Van Nuys, CA 91401
Telephone: (818) 901-5482

Attorney for Petitioners

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INTRODUCTION

(A) G&G's Request for a Pre-deprivation Hearing

G&G, in what appears to be a major shift in its position in this case, raises some new arguments and relinquishes some of its previous contentions, including a substantial part of the rationale articulated by the Ninth Circuit in rendering the judgment below. While the State concedes that G&G is entitled to advance any argument for affirming the judgment which finds support in the record, and may even disengage and distance itself from the reasoning of the Circuit Court altogether to the extent it finds it unpersuasive, G&G goes one step too far. Thus, it now argues, *without having sought review of the decision below*, that it is entitled to relief beyond that ultimately granted by the Ninth Circuit.

G&G is therefore seeking nothing less than a ruling from this Court that a pre-deprivation hearing is mandatory in this case (Res. Br. 40 *et seq.*), despite the fact the Ninth Circuit expressly determined after granting the State's Petition for Rehearing in 1998 that a post-deprivation hearing was all that was constitutionally required to satisfy G&G's due process rights (Pet. A-18).[1] In other words, G&G is not simply asking this Court to affirm the

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[1] To bolster the new grounds it argues for upholding the judgment in place of the grounds adopted by the Ninth Circuit, G&G has improperly attempted to augment the record by lodging new documents at the time it filed its brief. Some of these documents relate to transactions other than the three projects (California State University at San Bernardino, Culver City City Hall, and San Joaquin Hospital) which are the subject matter of this case (Pet. A-23, Jt. App. 191). Petitioners recently filed a motion objecting to the consideration of these new documents.

existing judgment – it is asking for a new judgment which will be much more favorable to its interests.

The fact that G&G failed to file a petition for rehearing of its own in the Ninth Circuit following this determination, neglected to file a cross-petition for writ of certiorari in this Court, and did nothing to preserve the issue during the more than two years that have elapsed between the Ninth Circuit's modification and the submission of G&G's brief in the present proceeding, forecloses it from making such an argument at this time. In short, G&G must be deemed to have waived its rights by not timely asserting this point immediately after the modified opinion was issued.

As authority for its position that a pre-deprivation hearing is required in this case, G&G cites decisions of this Court involving the direct seizure of vested assets through state sanctioned forfeiture procedures (such as garnishment). Even assuming, for purposes of argument, that G&G had not waived the right to make this argument, its contention is nevertheless doomed to fail on the merits. Thus, the factual setting of the present case, involving a routine withholding of funds held by a party to a contract disputing the other party's entitlement to such funds, is in no way analogous to the special circumstances reflected in the cases upon which G&G relies. The two types of cases are, in fact, manifestly poles apart.

(B) Other Issues Raised by G&G

G&G contends as well that state action is present in this case because the withholding of funds from the prime contractor by the public entity which awarded the contract results in what it characterizes as an automatic "pass through" to the subcontractor (Res. Br. 20 *et seq.*).

No evidentiary support is cited to corroborate the existence of this purported unvarying pattern or practice and none appears in the record. It is significant that this is the first time in these proceedings that G&G has made this argument and that, even now, no proof is cited to in the record. At the same time, G&G does not seem to dispute that prime contractors who have had money withheld by the contracting government agencies under the provisions of the prevailing wage law have the discretion to withhold or not withhold the same amount of money from their subcontractors. No attempt is made, moreover, to reconcile the existence of such discretion with the alleged automatic nature of the withholding practices of the prime contractor in practice.

G&G responds to the State's claim that its pleadings in this case are defective by again insisting that the Amended Complaint filed in the District Court adequately sets forth a prima facie claim entitling it to relief. Once again it makes much of its allegation that the withholding of funds was "wrongful, incorrect, and excessive" (Res. Br. 49 *et seq.*). Established rules of pleading clearly require much more, however. G&G was at the very least legally obligated to allege 1) the existence of contracts with the prime contractors; and 2) that it had met all conditions precedent to payment under these contracts, including compliance with the prevailing wage law. The Amended Complaint alleges neither of these critical elements, does not sufficiently describe a valid property interest, and accordingly cannot serve as the basis for relief in favor of G&G. By failing to identify the nature of the property interest in question, G&G has effectively precluded the Court from analyzing the scope of this purported right for due process purposes.

Though G&G's abandonment in part of the reasoning of the Ninth Circuit is understandable in many respects in light of the major pitfalls it faces,[2] the new grounds it raises are no more persuasive or well taken than the erroneous grounds they replace, and are likewise utterly unsubstantiated by the record in this case. Furthermore, G&G has not undertaken to respond to other arguments contained in the Petitioner's Brief, and has fallen far short of establishing that the purported property rights it claims to possess are significant enough to warrant constitutional protection.

For the reasons stated herein, as well as for the reasons set forth in its initial brief, the State submits that the judgment below must be reversed.

I

THE REMEDIES PROVIDED TO G&G ARE SUFFICIENT TO MEET THE REQUIREMENTS OF DUE PROCESS

The Ninth Circuit found the pertinent provisions of the California Labor Code unconstitutional as applied

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[2] G&G does, however, adhere to the position of the Ninth Circuit that the claim is based on statute and not on contract. But G&G's rights, if any, are necessarily conditioned on the terms of the undisclosed subcontracts, even though the prime contractors may assign to G&G their own contractual rights against the State. The mere fact that certain of the terms of the contract between the public entity and its prime contractor is codified in the California Labor Code does not change the consensual nature of the legal relationships of the parties. Furthermore, if G&G agreed to withholding as part of its subcontract, it is bound by that agreement. Constitutional rights may be knowingly waived by contract. *Wall v. Parrot Silver & Copper Co.*, 244 U.S. 407, 410, 61 L. Ed. 1229, 37 S. Ct. 609 (1917).

because it determined that there was no available state remedy for G&G to contest the withholding of funds by the prime contractors on the three projects in question.

> "In this case, subcontractors like G&G are afforded neither a pre- nor post-deprivation hearing when payments are withheld."
>
> (Pet. A-69)

This critical statement, which is at the core of the Ninth Circuit's determination that there was a due process violation, is clearly erroneous. As the State has repeatedly shown, there is an entire arsenal of contractual and other remedies under California law at the disposal of public works subcontractors who find themselves in the position that G&G did here (see discussion at p. 34 *et seq.* of Petitioner's Brief).

These remedies, include, in the absence of an assignment of rights by the prime contractor, contractual claims for damages, recission, restitution, declaratory and injunctive relief, etc., an action for equitable subrogation, a petition for writ of mandate (*J&K Painting Co., Inc. v. Bradshaw*, 45 Cal. App. 4th 1394, 1402, 53 Cal. Rptr. 2d 1415), an action based on the statutory stop notice procedure, and a claim against the prime contractor's payment bond (see discussion in Pet. Br. 36-37). G&G needed only to avail itself of any one of these familiar remedies to secure a full and fair hearing on the merits of the dispute. It chose not to do so, envisioning its relief in the federal courts instead.

Conspicuous by its absence from G&G's Brief is any argument challenging the State's position regarding the existing availability of these enumerated remedies for public works subcontractors under state law. As we have seen, G&G appears, on the contrary, to have eschewed

the Ninth Circuit's determination that no valid state remedy exists in the present situation as an untenable argument, and to have conceded, as it must, that viable remedies exist under state law.[3]

(A) State Procedures Affording A Post-deprivation Hearing Are Sufficient To Comply With Due Process Requirements

While abandoning the Ninth Circuit's rationale that no available remedies exist under state law, G&G nevertheless argues that state remedies must be provided at a pre-deprivation stage to be adequate for purposes of due process. In support of its position that all existing state remedies are insufficient to satisfy due process requirements to the extent they do not mandate a pre-deprivation hearing, G&G relies on *Sniadach v. Family Finance Corporation*, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969) and *United States v. James Daniel Good Real Property*, 510 U.S. 43, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993) (Res. Br. 40-41, 43-44).[4]

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[3] For example, G&G states "[t]he right to a hearing for a prime contractor remedies G&G's problems as a prime contractor, and mostly as a subcontractor, since DLSE concedes an equitable right of subrogation for participation by a subcontractor, and a subcontractor may well be able to participate, in any event, as an assignee, witness or joint participant in such a hearing" (Res. Br. 32-33); and "equitable subrogation permits the subcontractor to stand in the shoes of the prime contractor" (Res. Br. 23, 24).

[4] G&G does not advance the argument of the Ninth Circuit that section 1729 of the Labor Code would somehow ultimately impair G&G's contractual rights of recovery in the state courts (Pet. A-20). A careful and fair reading of this section leads to only one reasonable conclusion: that though the prime contractor's withholding is made lawful by that section where the subcontractor has failed to comply with the prevailing wage law, no presumption is made concerning ultimate ownership and liability regarding these funds. The Ninth Circuit's interpretation of this provision was tantamount to treating it as a conclusive presumption against the liability of the prime contractor for the funds. This construction was not warranted by the language of this section and was inconsistent with the well-established principle that state statutes are to be interpreted where possible in favor of their constitutionality. *Alabama Federation of Labor v. McAdory*, 325 U.S. 450, 461, 89 L. Ed. 1725, 65 S. Ct. 1384 (1945).

Even assuming G&G could sit back more than two years, seek no review, and now contend it is entitled to a more favorable result than the one issued by the Ninth Circuit, its argument would necessarily fail on the merits based on the clear weight of authority to the contrary.

Sniadach (a garnishment case) and *James Good* (where the federal government required forfeiture of real property based on drug activity), the cases in which G&G places its reliance, each involved the summary divestiture of established property interests. In *James Good*, it was emphasized that the requirement of a pre-deprivation hearing rested primarily on the fact that real property is unmovable and indestructible. The Court noted that it had not generally required pre-deprivation hearings in cases involving other types of property, even those including large items like yachts (citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 40 L. Ed. 2d 452, 94 S. Ct. 2080 (1974)).

The relatively rare cases mandating pre-deprivation hearings are clearly no authority for the proposition that the same type of hearing is required, where, as here, a

governmental agency has possession of money and withholds payment to the other party based on a legitimate and good faith dispute concerning entitlement to this money. G&G has not cited and could not cite any authority to the effect that the requirement of a pre-deprivation hearing is necessary or appropriate in this latter situation.

A party in possession of disputed money or property would, in most cases, be deemed imprudent if he turned the money or property over to the other party solely because that party had made a claim. Principles of equity, for example, have long recognized the need for preservation of the status quo during the pendency of disputes between litigants over money or property. *University of Texas v. Camerisch*, 451 U.S. 390, 395, 68 L. Ed. 2d 175, 101 S. Ct. 1830 (1981). Furthermore, it has long been standard commercial practice in this country for a person or entity who possesses money or property claimed by another, and who disputes that other's claim, to withhold payment pending a resolution of the underlying dispute by a court or arbitrator. Expressing what can be argued to be a part of the underlying philosophy of *American Manufacturer's Mutual Insurance Co. v. Sullivan*, 526 U.S. 40, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999), Justice Stevens wrote in his concurring opinion in that case, "[i]t is not unfair, in and of itself, for a State to allow either a private or publicly owned party to withhold payment of a state-created entitlement pending resolution of a dispute over its amount." 143 L. Ed. 2d at 153.

G&G has mistakenly taken the broad pronouncements of *Sniadach* and *James Good* and misapplied them to a situation involving significantly distinct facts. Neither of these cases constitutes authority for the proposition G&G advances because there was no direct seizure by the

state of a vested property interest in the possession of the other party in the case at bench.

Years ago Justice Powell warned, in a well-reasoned concurring opinion in *Logan v. Zimmerman*, 455 U.S. 422, 443, 101 S. Ct. 1148, 71 L. Ed. 2d 265 (1982), about the pitfalls of the broad application of due process principles articulated in cases involving certain facts to other cases involving markedly different facts, urging that the decision in each case must be governed by the individual circumstances of each case. That admonition is as apt an observation concerning the application of due process principles now as it was then. A careful reading of *Sniadach* and *James Good* can only lead to the conclusion that the requirements they articulate do not extend beyond the context of the fact situations posed. Principles that are developed in cases involving seizures of vested property interests simply have no application to a situation, as here, where a government agency in possession of funds merely refuses in good faith to pay a disputed bill.

Thus, in *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 611, 40 L. Ed. 2d 406, 94 S. Ct. 1895 (1974) this Court stated that "[t]he usual rule has been [w]here only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process if the opportunity given for ultimate judicial determination of liability is adequate." (Quoting *Phillips v. Commissioner*, 283 U.S. 589, 596-597 (1931)).

If G&G has a property right within the meaning of the Due Process Clause of the Fourteenth Amendment at all, a proposition the State vigorously opposes (see Pet. Br. 24, *et seq.*), that disputed right is fully and adequately protected at a post-deprivation hearing of the kind provided under California law. Thus, G&G could have had

its day in court and a judgment on the merits of this dispute long ago had it simply invoked one or more of these straightforward remedies.

While it is to be expected that there may be delays in the processing and resolution of cases in the court systems of any local jurisdiction, most of these delays are generally not unreasonable. The State of California, the largest state in the union, will without doubt remain a solvent entity at the time a final judgment is entered in the case. Building subcontractors, on the other hand, as experience has repeatedly shown, are far less stable and predictable than other types of businesses.

> "[T]he vast majority of construction contractors, especially the smaller contractors are undercapitalized and may have virtually no assets. It is not uncommon for these contractors, may [sic] of whom have incorporated, to cease doing business the minute a claim for unpaid wages comes forth only to reopen under a different corporate entity the next day."

(Jt. App. 341)

G&G, like many building subcontractors, who according to its own admission "often go out of business" (Res. Br. 42), might have vanished from the scene itself if prompt withholding had not been implemented in this case, a development that would have been to the significant financial detriment of G&G's workers. While a pre-deprivation hearing benefits contractors like G&G, it is inherently subject to abuse and often ends in penalizing the workers – the people the prevailing wage law was enacted to protect.

(B) G&G's claim that a pre-deprivation hearing is required is not properly before this Court and is without merit in any event

After granting the State's Petition for Rehearing, the Ninth Circuit amended its prior decision on September 10, 1998, holding for the first time that a post-deprivation hearing met the requirements of due process (Petition A-18). In its initial decision in this case, the panel did not commit to which type of hearing was mandated (Petition A-69-70). The Court stated:

> "Here, we have no doubt that the state's interest in ensuring the payment of prevailing wages is sufficiently 'important,' *see Mallen*, 486 U.S. at 240, to justify the withholding of funds pending the outcome of whatever kind of hearing may be afforded."

G&G did not seek review of the Ninth Circuit's determination that a post-deprivation hearing was adequate either in that court or this Court. Nevertheless, more than two years later, having done nothing to preserve the issue in the interim, it now argues that this Court should impose the requirement of a pre-deprivation hearing in these cases.

While, as mentioned above, G&G is entitled to distance itself from the reasoning of the Ninth Circuit if it sees fit to do so, and may advance any alternative argument that finds support in the record to urge that the judgment be affirmed, it cannot play fast and loose with this Court and petitioners by demanding relief greater than that prescribed in the judgment issued by the Ninth Circuit, especially after having taken no steps previously to challenge that court's determination. *Neely v. Eby Construction Co.*, 386 U.S. 317, 330, 18 L. Ed. 2d 75, 87 S. Ct. 1072 (1967).

It is submitted that under no circumstances should G&G's request on appeal for a modification of the judgment, requiring a pre-deprivation hearing before funds may be withheld, be considered by this Court, the opportunity to relitigate this same issue having been waived by G&G's failure to seek review earlier.

II

THE DEPRIVATION OF PROPERTY COMPLAINED OF WAS NOT PURSUANT TO STATE ACTION

G&G argues for the first time that the procedure by which the prime contractor withholds monies from the subcontractor constitutes "state action" because the withholding results in an automatic "pass through" to the subcontractor (Res. Br. 20-22). No citation is made either within or outside the record in substantiation of this dubious proposition.

In *American Manufacturers Mutual Insurance Co. v. Sullivan, supra,* 526 U.S. 40, 53, this Court held, quoting *Flagg Bros., Inc. v. Brooks,* 436 U.S. 149, 166, 98 S. Ct. 1789, 56 L. Ed. 2d 185 (1978), that the State can only be held responsible for private action "when it has exercised coercive power or has provided significant encouragement, either overt or covert, that the choice must be deemed that of the State."

While section 1729 of the California Labor Code plainly authorizes a prime contractor to withhold from a subcontractor a sum equivalent to that withheld from him, to the same extent as the Pennsylvania law authorized a workers compensation insurer to withhold medical benefits claimed, the prime contractor who withholds under section 1729 has no more been coerced or significantly encouraged to do so than the insurer in *Sullivan*

because without question, each acts at his own discretion.[5]

To assume, moreover, that the prime contractor will in all instances withhold a like amount from the subcontractor not only lacks documentation in the record, it is contrary to human experience and common sense. Many considerations necessarily enter into this kind of determination on the part of the prime contractor. An obvious factor is the strong possibility that if the prime contractor withholds from his subcontractor he will be buying all the expenses and nuisance of a lawsuit. Long term relationships exist in this, as well as other, industries, so that it is reasonable to expect that different treatment may be given to subcontractors who have a long history of dealing with a prime contractor. Instead of passing on the withholding, the prime contractor might agree to give the subcontractor additional time to correct a disputed item or items. The prime contractor may be holding substantial sums in progress payments payable to the subcontractor and therefore may defer passing through the sum withheld from it by the state because it is not at risk in recouping these withheld funds from the subcontractor in the future. In other words, the prime contractor is not always in the position of having "to absorb the loss" as G&G contends (Res. Br. 21-22), if it decides not to withhold itself. There are, no doubt, many other circumstances that come to mind which might

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[5] G&G confuses the test for determining standing to sue with the test for determining state action.

influence a prime contractor to decide not to withhold from his subcontractor.[6]

As the party attacking the withholding process, it was the burden of G&G to present competent evidence showing the existence of a custom and practice in the public construction industry of prime contractors automatically passing these sums through to their subcontractors. G&G has failed to plead or substantiate this claim and accordingly cannot prevail on this point.[7]

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[6] The argument that the Court should assume that the payments withheld were "due" and therefore established property interests (Res. Br. 29 *et seq.*) because the notices to withhold and some of the pertinent statutory language refers to them as such has at most a kind of surface appeal. The context is perhaps temporal, i.e. the payments were due at some point in time. Certainly in view of the clear requirements of the prevailing wage law we can assume that the Legislature and DLSE meant otherwise due because there is no doubt that compliance with the prevailing wage requirements was a condition precedent to payment. This seizing on a word to construct an entire legal theory is typical of G&G's reluctance to deal with the significant underlying facts in this case.

[7] G&G goes to great lengths to distinguish the so-called proprietary and regulatory functions of petitioner and the awarding bodies, incorrectly defining their roles in the process (Res. Br. 6-9, 14-15, 26-30). Thus "awarding body" is defined in section 1722 of the California Labor Code as a governmental "department, board, authority, officer or agent awarding a contract work public work." Clearly both are agencies of the State of California or its political subdivisions. The awarding body, moreover, has an independent duty to withhold funds for violations of the prevailing wage law even if not notified of these violations by petitioners. *J&K Painting Co., Inc. v. Bradshaw*, 45 Cal. App. 4th 1394, 1408, 53 Cal. Rptr. 2d 505 (1996). G&G also makes much of the fact that the Division of Labor Standards Enforcement sought "prosecutorial" immunity in another case with G&G, going outside the record in this case

III

G&G FAILED TO SUSTAIN ITS BURDEN TO SHOW AN ENTITLEMENT TO THE FUNDS WITHHELD

G&G filed this action seeking declaratory and injunctive relief. The allegations of the First Amended Complaint merely identify the parties, allege that G&G performed work on certain public works projects; that Petitioners issued notices to withhold under color of law; and that not less than $135,000 was withheld from prime contractors on the project who withheld a like sum from G&G; that no notice or hearings were given in connection with the withholding of these sums; and that the withholding was unconstitutional and was "invalid, illegal, and in deprivation" of G&G's rights (Jt. App. 63-70).

Conceding that it has the burden of proof in an action of this kind (Res. Br. 40), G&G asserts that these allegations are sufficient to establish its entitlement, sufficient to "clear" the necessary pleading "hurdles" (*Sullivan, supra*, 526 U.S. at 561) to establish a claim upon which relief can be granted (Res. Br. 49-50). This assertion, upon careful examination, proves to be little more than bluster.

Thus, nowhere in this First Amended Complaint does G&G allege that it was a party to a contract, let alone whether the contract was written or oral. Significantly, while G&G claims a property right for due process purposes, it does not even allege the terms of the contract,

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to establish this fact. The so-called "prosecutorial" immunity under federal law, however, extends far behind those who prosecute civil or criminal actions, and includes persons and agencies performing supportive and clerical functions. *Imbler v. Pachtman*, 424 U.S. 409, 47 L. Ed. 2d 128, 96 S. Ct. 984 (1976).

essential information to the ascertainment of the nature of this purported property right. Nowhere does G&G allege it performed all conditions necessary to be performed on its part under such contract, if any. Finally, G&G does not even allege that it complied with the prevailing wage provisions of its purported contract. G&G does not deny, furthermore, that it has bargained away its rights by contractually agreeing that the prime contractors could summarily withhold funds which might have been otherwise due.

The necessary elements required to be alleged in pleading a claim based in whole or in part upon a contract in California and virtually all other jurisdictions are: (1) the existence and nature of the contract, (2) plaintiff's performance or excuse for nonperformance of all conditions, (3) defendant's breach, and (4) the resulting damage to plaintiff. See, e.g., *Reichert v. General Insurance Co.*, 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321 (1968).

These fundamental elements of G&G's case had to be pleaded and proved, just as the claimants in *Sullivan* were required to plead and prove that the medical care they received was reasonable and necessary. The failure to allege these elements, which are the very foundation of its case, is fatal to the subcontractor plaintiff's right to proceed and can result in the dismissal of his case.[8]

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[8] Another of G&G's unconvincing arguments is the contention that it was both a prime and a subcontractor. While G&G may have filled the role of a prime contractor on other projects, none of these projects were involved in the present case. The Declaration of Itai Ben-Artzi submitted in connection with G&G's summary judgment motion clearly identifies the three projects (California State University at San Bernardino, Culver City City Hall, and San Joaquin General Hospital)

IV

G&G DID NOT SUSTAIN ITS BURDEN OF SHOWING IT WAS A "TARGETED" CONTRACTOR

Parroting the Ninth Circuit's unsupported and insupportable characterization of it as a targeted company (Pet. A-33-34, Res. Br. 39-40), while disputing the undeniable, that the withholding of funds from the prime contractor only affected it indirectly, G&G once more argues that it is not subject to the doctrine of *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 100 S. Ct. 2467, 65 L. Ed. 2d 506 (1980) because it falls within the so-called "targeted" exception to that doctrine.

In deciding, based on this exception, that *O'Bannon* did not apply, the Ninth Circuit merely stated, "[u]nlike the nursing home residents in that case, G&G is the target of the state's action here" (Pet. A-33-34). No explanation has ever been given and no evidence has ever been identified which would show how the panel reached this singular conclusion. (The determination was made *sua sponte*, G&G only taking up the argument after the panel did.) Not only do the Ninth Circuit and G&G fail to substantiate this conclusion, though the State has continued to call on them to do so (see Petitions for Rehearing in Ninth Circuit), a careful perusal of the record in this

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covered in the present lawsuit. Paragraph 8 of that Declaration recites that "the prime contractors for each of the respective projects have withheld payment from G&G on account of the notices to withhold" (Jt. App 191). Furthermore, it is academic whether G&G was a prime or subcontractor since in either case it possessed a right to review under a variety of legal theories (see discussion in Petitioner's Brief at p. 32 *et seq.*).

case fails to turn up any evidence worthy of the name to support this allegation. In arguing this point again in its brief, the best G&G seems capable of mustering is the lame statement, urged for the first time in this Court, that it "believed it was being targeted by DLSE, because of its non-union status" (Res. Br. 2). Supposition, which is no substitute for evidence, appears to have been the source of this tenuous theory from its inception.

Both the Ninth Circuit and G&G may have confused the foreseeable with the intentional. The mere fact that a government agency has reason to believe that its actions will have an impact on a third party does not, in and of itself, subject it to liability (see, for example, the series of federal decisions previously discussed where though an impact on a third party or third parties was indeed foreseeable, the courts found no targeting of the third party or parties (Pet. Br. 44)).

In view of the patent absence of any evidence in the record to support a finding that G&G was targeted, *O'Bannon* obviously applies and G&G must be barred from any relief since its injuries, if any, suffered as a

result of the withholding from the prime contractor are by definition indirect and, therefore, not actionable.[9]

CONCLUSION

The State of California struck a bargain with the prime contractors who successfully bid on its public works projects, a bargain that was based on enumerated specifications. Part of that bargain was that these prime contractors guaranteed that both they and the subcontractors under their control would pay prevailing wages to all workers employed on the job site. Having paid a premium to obtain this concession, the State had an absolute right to insist on full performance of these terms. In view of the well-known propensities of subcontractors toward insolvency, the State had reason to insist on a procedure where payments could be withheld in the first instance to insure that workers on the project would not suffer injury.

With a kind of "sinking ship" desperation, G&G abandons some of the central rationale of the Ninth Circuit, especially the indefensible finding of that Court that

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[9] The Amicus Brief submitted by the Solicitor General notes in passing two provisions of section 1775 of the California Labor Code which became effective January 1, 1998, opining that these provisions "might now support a finding of state action." (Sol. Br. 29-30). The constitutional implications of this 1998 enactment are clearly not before the Court here because the complained of withholdings in this case all took place in 1995. Moreover, these 1998 provisions also require inclusion of the new withholding obligations in the subcontract, raising again the issue of waiver of constitutional rights (see footnote 2, *supra*). *Fahey v. Mallonee*, 332 U.S. 245, 255, 91 L. Ed. 2030, 67 S. Ct. 1552 (1947).

adequate state remedies are nonexistent, and offers as a substitute a position that finds little support in logic or precedent, and which relies too much on "evidence" outside the record.

For the reasons advanced herein and in Petitioner's initial brief, it is submitted that the Ninth Circuit's decision in this case is without evidentiary support, has no foundation in established law, and must be reversed. *A Fortiori,* G&G's belated attempt to "sweeten" the judgment by requiring a pre-deprivation hearing must be rejected out of hand.

Respectfully submitted,

THOMAS S. KERRIGAN
Counsel of Record
DIVISION OF LABOR STANDARDS ENFORCEMENT
DEPARTMENT OF INDUSTRIAL RELATIONS
State of California
6150 Van Nuys Boulevard
Van Nuys, California 91401
(818) 901-5482